Supreme Court, U.S.
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NO. _____

IN THE UNITED STATES SUPREME COURT
OCTOBER TERM 1983

TOM HENRY,
PETITIONER,
vs.
UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE PETITIONER WAS DENIED HIS RIGHT TO DUE PROCESS BY THE TRIAL COURT'S REFUSAL TO BIFURCATE THE PROCEEDING CONCERNING THE CRIMINAL FORFEITURE, WHICH REQUIRED PROOF ONLY BY A PREPONDERENCE OF THE EVIDENCE, FROM THE ISSUE OF GUILT WHICH REQUIRED PROOF BEYOND A REASONABLE DOUBT?

II. WHETHER THE FAILURE OF THE TRIAL COURT TO GIVE THE DEFENSE TENDERED UNANIMITY INSTRUCTION DEPRIVED THE PETITIONER OF HIS RIGHT TO A UNANIMOUS VERDICT AS REQUIRED BY THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES?

III. WHETHER COUNTS FOUR AND FIVE ARE MULTIPLICITOUS THUS REQUIRING, UNDER PRINCIPLES RELATED TO DOUBLE JEOPARDY, THAT PETITIONER'S CONVICTIONS ON THOSE COUNTS, AS WELL AS THOSE ON COUNTS SIX THROUGH THIRTEEN AND THIRTY-SIX WHICH ARE DEPENDANT ON THE CONVICTIONS ON COUNTS FOUR AND FIVE, MUST BE SET ASIDE AND THE COUNTS DISMISSED?

PARTIES TO THE PROCEEDING

The United States, Tom Henry, David Jones and James Henry were the only parties in this action before the United States Court of Appeals for the Sixth Circuit, Case Nos. 92-6649, 92-6650 and 92-6653. However, there were originally eight defendants named in Indictment 3:91-00095 before the United States District Court for the Middle District of Tennessee. All other defendant's either were severed before trial and worked out agreements with the government or, in the alternative, were acquitted. David Jones has filed a separate petition for a writ of certiorari to this Court. James Henry has expressed a decision not to proceed further in this matter.

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OPINION BELOW

The per curiam opinion of the Court of Appeals was entered on November 29, 1993, is unpublished and is included in the Appendix at A-1. Both James Henry and David Jones filed petitions for rehearing which were denied, without opinion, on January 7, 1994. The orders denying rehearing are included in the appendix at A-21, A-22.

JURISDICTION

The Petitioner seeks review of the decision of the United States Court of Appeals for the Sixth Circuit entered on November 29, 1993. (Appendix A-1).

Petitions for rehearing were timely filed in the court of appeals by petitioner's codefendants, James Henry and David Jones, whose appeals to the Sixth Circuit had been consolidated with that to petitioner for argument and decision. These petitions for rehearing were denied by order entered January 7, 1994. (Appendix A-21, A-22).

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

CONSTITUTIONAL PROVISIONS

Fifth Amendment:

> Due Process: ... nor be deprived of life, liberty, or property, without due process of law; ...
>
> Double Jeopardy: ... nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb;

Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right to a ... trial, by an impartial jury ...

STATUTES

18 U.S.C. § 666

(a) Whoever, if the circumstance described in subsection (b) of this section exists-

> (1) being an agent of an organization, or of a State, local or Indian tribal government, or any agency thereof.

(A) embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the right owner or intentionally misapplies property that-

(i) is valued at $5,000 or more, and

(ii) is owned by, or is under the care, custody or control or such organization, government or agency; or

. . . .

shall be fined under this title imprisoned not more than 10 years, or both.

(b) The circumstances referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan guarantee, insurance, or other form of Federal assistance.

(c) This section does not apply to bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business.

(d) As used in this section-

. . . .

(4) the term "in any one-year period" means a continuous period that commences no earlier than twelve months before the commission of the offense or that ends no later than twelve months after the commission of the offense. Such period may include time both before and after the commission of the offense.

STATEMENT OF THE CASE

This petition involves a criminal case for which jurisdiction in the district court was pursuant to 18 U.S.C. § 3231.

Petitioner was initially indicted in this matter on May 7, 1991. He was subsequently tried upon a 36 count superseding indictment which was filed on February 20, 1992.

The superseding indictment charged Tom Henry in 35 of the 36 counts. The first three counts alleged conspiracies to defraud the United States. In Count One, defendant was charged under U.S.C. § 371, with conspiracy to defraud the United States by falsely stating that Tennessee Health Services, the management company controlled by Tom Henry, and various home health care agencies which it managed were not related parties under the regulations pertaining to medicare. Count Two charged an additional conspiracy to defraud under 18 U.S.C. § 371 relating that Tom Henry, Lee Davis and Houston Kelly conspired to defraud the United States by offering remuneration to doctors in return for referral of patients to home health care agencies owned and/or controlled by Tom Henry. Count Three alleged yet another conspiracy in violation of 18 U.S.C. § 371 stating that Tom Henry, David Jones and Dan Miller conspired to defraud the United States by fraudulently obtaining money from the medicare program by concealing Tom Henry's control of Argus Medical Supplies, Inc. and K.M.&M. Leasing, Inc.

Counts Four and Five alleged violation of Title

18 U.S.C. § 666(a)(1)(A), theft from an organization receiving government benefits. Count Four alleged that Tom Henry obtained by fraud and intentionally misapplied funds totalling $191,206.80 used for the purchase of his personal residence and an adjacent lot, that such funds were the funds of an organization which received benefits from a federal assistance program in excess of ten thousand dollars, and that the funds were in the care, custody and control of Tennessee Health Services, Inc. Count Five charged, on the same basis and in the same year, that Tom Henry obtained by fraud and intentionally misapplied $49,762.84 taken from Tennessee Health Services. Counts Six through Thirteen alleged specific checks and payments with regard to the money taken from Tennessee Health Services and used for payments of Tom Henry's personal residence and adjacent lot in violation of Title 18, § 1957 and 2. Counts Fourteen through Twenty-nine charged Tom Henry, either alone or with various others, with filing cost reports containing false statements regarding medicare for various health care providers from 1987 through 1990. Tom Henry was not charged in Count Thirty. Count Thirty-one charged that Tom Henry, along with Lee Davis, offered to pay and did pay remuneration to Houston Kelly to refer individuals to health care agencies owned by Tom Henry in violation of Title 42, U.S.C. § 1320(a)-7(b)(2)(A) and Title 18, U.S.C. § 2. Counts Thirty-two through Thirty-four alleged that with regard to specific audits, petitioner, David Jones and Dan Miller endeavored to influence, obstruct or impede a federal auditor in the performance of his duties. Count Thirty-five alleged
that Tom Henry and David Jones submitted false, fictitious or fraudulent claims to Medicaid in violation

of 18 U.S.C. § 287 and 2. And finally, Count Thirty-six requested the forfeiture of various money and property allegedly owned by Tom Henry said to be subject to forfeiture pursuant to 18 U.S.C. § 982(b)(1)(A).

The trial in this matter began on April 23, 1992, and on June 23, 1992, the jury returned verdicts finding Tom Henry guilty in Counts One through Thirteen, Fifteen through Twenty-nine, Thirty-one through Thirty-five and finding as to Count Thirty-six that $191,206.80 should be forfeited to the United States, but found that neither the house located on Lot 18, Southfork Estates, nor the adjoining parcel of land should be subject to forfeiture. The jury returned a verdict of not guilty on Count Fourteen.

The sentencing hearing in this matter was held on November 23, 1992, and Tom Henry was sentenced to imprisonment for 57 months, supervised release for a term three years, restitution of $4,464,697.25, the forfeiture to the United States of the amount of $191,206.80 and a special assessment of $1,650.00.

On December 1, 1992, appellant, Tom Henry, filed his Notice of Appeal to the United States Court of Appeals for the Sixth Circuit, and that court affirmed the judgment of the district court on November 29, 1994. The appeals of co-defendants James Henry and David Jones were consolidated with petitioner's appeal. Both James Henry and David Jones filed petitions for rehearing which were denied on January 7, 1994. (Appendix A-21, A-22).

Tom Henry was an entrepreneur from Lebanon, Tennessee, who built up a sizable empire of home health care agencies. These included the agencies that are the subject of the criminal charges in the instant case. These included Tennessee Health Services, Mid-Cumberland Home Health Care, Doctors Home Health, Inc., South-Central Home Health Care Agency First Tennessee In-Home Health, Inc., and Southwest Home Health, Inc.

The home health industry was prone to cashflow difficulties due to the manner in which the federal government paid for medicare claims. The medicare system is a reimbursement system wherein Medicare reimbursed the home health care agency after the services were provided. There was therefore a delay between the initial rendering of the service and payment by Medicare. In addition, the home health care agencies were required to file annual cost reports wherein they justified all of their expenses through the year. Based upon the cost reports, there was an accounting made between the home health care agencies and Medicare wherein either the home health care agency would owe money back to Medicare or, in the alternative, additional funds would be due and owing to the home health care agency. Therefore, each year the agency was unsure of what its final income would be.

Beginning in approximately 1986, Tom Henry attempted to sell his home health care agencies to the A.M.E. Church in an effort to establish an A.M.E. Church based home health care system wherein Tom Henry would simply offer the management and accounting services for the agencies. When, for

various reasons, this failed to come to pass, in 1989, Tom Henry sold his health care agencies to John Greer, Jr. for $25,000 and began DATOM International and DATOM Business Services which performed, among other things, management and accounting services for health care agencies. John Greer and the home health care agencies then contracted with DATOM for their managerial and financial services. At this time, the health care agencies were growing rapidly; consequently, so were the services provided. The contract called for both DATOM International and DATOM Business Services to receive a specific fee per visit. These fees were placed in the cost reports for 1989 and beyond as legitimate management fees.

In addition, Tom Henry assisted in the development of other spinoff companies. These included KM&M Leasing that was owned by John Greer, Sr., which provided the financing for various automobiles and office equipment needed by the home health agencies and DATOM businesses. In addition, at Tom Henry's suggestion, Sidney "Bucky" Ford, the husband of Henry's stepdaughter, began a medical supply company called Argus that provided the medical supplies needed by the home health agencies. Other spinoff companies were also founded, including another leasing company that was directed by Tom Henry's sister. The expense paid for these products was then submitted to Medicare on the cost reports. This practice raised a serious issue as to whether these companies were "related parties" under the Medicare regulations and thus should be allowed to claim only actual costs.

In the meantime, the accounting company, DATOM Business Services, also grew exponentially. Prior to 1989 when the accounting was done by the accounting firm of Thompson and Jones, the accounting services for the home health care agencies and the other independent clients of Thompson and Jones were handled by four employees. However, by the end of 1989, the company had grown to 28 employees, most of whom handled the home health care financial requirements. By this time, DATOM Business Services was handling both the daily ledgers of the companies as well as completing the cost reports and other financial duties. Because the corporation lacked an individual who was experienced in the completion of cost reports, DATOM Business Services hired Dan Miller who had most recently served as an auditor for Prudential Insurance Company when it served as the fiscal intermediary for Medicare.

When the auditors for Blue Cross/Blue Shield, which was then the fiscal intermediary for Medicare, questioned certain items in the cost reports, Miller provided what turned out to be false or altered documents in an attempt to satisfy the audit request. These included checks that were either substituted for the requested checks or, in the alternative, checks that had been altered to appear to be the requested checks. In addition, there were various documents that supported bonuses which had been approved for the employees of the health care agencies that were intended to justify additional funds for the years 1987 and 1989. These bonuses were never paid; however, they were also not allowed during the audit.

Moreover, the cost reports that were completed failed to indicate that several of the corporations that did business with the home health care agencies or DATOM itself, in its business with the home health care agencies, were "related parties." However, there was testimony that in order to challenge whether or not they were related parties, the provider must first deny the related party connection and then argue the merits during the audit procedure. The government's evidence indicated that the proper method to challenge a "related party" issue was, in addition to checking the "related parties" box, to indicate on an attached form that a "related party" question existed. To assist in the audits, DATOM hired experienced Medicare financial accountants and experts to help convince Medicare that these were not related agencies and that, in fact, they were due the money they were requesting.

The government's proof further showed that in 1989, Tom Henry took in excess of $200,000 out of the funds of Tennessee Health Services and used them to pay for his home in Lebanon, Tennessee. It was Tom Henry's contention that these funds were sums owed to him in salary, delayed compensation, and repayment of loans. Although there was no denial that much of this money was due to Tom Henry, the government's proof alleged that the money taken out in 1989 was in excess of any amount owed to Tom Henry. Although Tennessee Health Services was no longer a Medicare company, its accounts continued to serve as a clearing house account for 1989. Therefore, the Medicare funds that were destined for the other home health care agencies were funneled through the Tennessee Health Services

account.

REASONS FOR ALLOWING THE WRIT

I. THE PETITIONER WAS DENIED HIS RIGHT TO DUE PROCESS BY THE TRIAL COURT'S REFUSAL TO BIFURCATE THE PROCEEDING CONCERNING THE CRIMINAL FORFEITURE, FROM THE ISSUE OF GUILT BEYOND A REASONABLE DOUBT.

During the discussion on the jury instructions, the defense requested that the court bifurcate the decision with regard to the criminal forfeiture matter. Petitioner contended that bifurcation was required to protect his due process rights, in that the forfeiture count required only proof by a preponderance of the evidence; whereas, the other thirty four counts required proof beyond a reasonable doubt. The defense therefore suggested that failing to bifurcate the trial would result in confusion to the jury as to the proper standard of proof.

This issue has received considerable discussion which has resulted in a split in the circuit courts. Several circuits have determined that bifurcation is required in this situation. In United States v. Feldman, 853 F.2d 648, 660-663 (9th Cir.) cert. denied 49 U.S. 1030 (1988), the Court held that bifurcation was the preferred procedure, however, complete bifurcation was not necessary in all cases. By complete bifurcation, the Court meant that both the proof and the jury deliberation on the forfeiture be kept separate. The Ninth Circuit has continuously held that at least the jury determination as to the

forfeiture issue should be separated from the consideration of the *trial as a whole.*

Several courts have drawn from the death penalty cases such as McGautha v. California, 402 U.S. 183 (1971), vacated on other grounds sub nom. Crampton v. Ohio, 408 U.S. 941 (1972), for the proposition that there is a potentially unfair procedure in requiring the defendant to either waive his right to testify with regard to the sentencing or, as in this case, forfeiture, or subject himself to testifying in both the guilt phase and as to the sentencing or forfeiture issue. In McGautha, the Court acknowledged that holding both together created a serious problem but not of a constitutional magnitude. 408 U.S. at 195, 196, 221. In Greg v. Georgia, 428 U.S. 153, 190, 191 (1976), the Court stated with regard to a unitary homicide/death penalty proceeding that:

> Much of the information that is relevant to the sentencing decision may have no relevance to the question of guilt or may even be extremely prejudicial to a fair determination of that question. This problem however, is scarcely insurmountable. Those who have studied the question suggest that a bifurcated procedure . . . is the best answer.

Likewise, the defendant that faces a forfeiture may have issues that he wishes to impart during the forfeiture proceeding which are inconsistent with those he would wish to present during trial or to which he would preserve his right to remain silent

during the trial.

In addition, the avoidance of jury confusion is another reason given in favor of a bifurcated proceeding as to criminal forfeiture. As many authorities point out, the trials in which forfeiture is a question are generally complicated and lengthy proceedings. Thus, the forfeiture issue creates yet a further confusion in an overall complicated matter. United States v. Cauble, 706 F.2d 1322, 1348 (5th Cir. 1983), cert. denied, 465 U.S. 1005 (1984). While the defense did not request full bifurcation in this matter, it would have been the preferred standard. United States v. Sandini, 816 F.2d 869, 874 (3d Cir. 1987). Barring complete bifurcation, it was reversible error for the trial court not to grant at least a bifurcated jury decision.

The court below followed its former decision that bifurcation was merely a consideration for the discretion of the trial court. Bifurcation of a forfeiture count from other counts in a criminal trial implicates important considerations involving due process that this Court should resolve.

II. THE FAILURE OF THE TRIAL COURT TO GIVE THE DEFENSE TENDERED UNANIMITY INSTRUCTION DEPRIVED THE PETITIONER OF HIS RIGHT TO A UNANIMOUS VERDICT AS REQUIRED BY THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The defense strenuously objected to the court's unanimity instruction and requested a specific unanimity instruction as related to the court's charge

concerning violation of 18 U.S.C. § 1001, Counts Fourteen through Twenty-nine.

Petitioner was convicted by the jury of violations of 18 U.S.C. § 1001 (false statements) as charged in Counts 15 through 29. The counts charged:

> On or about certain dates, in the Middle District of Tennessee, in a matter within the jurisdiction of the United States Department of Health and Human Services, certain of the defendants knowingly and willfully made or used a false document knowing that the document contained false and fictitious statements and entries.

Each of these counts charged that petitioner made or used a false document knowing that the document contained false and fictitious statements and entries and that petitioner submitted cost reports to Medicare for 1989 for various home health agencies. These counts further charged that the cost reports were false in that they stated that there were no related party transactions in that year, when in truth and fact as they then and there well knew, there were related party transactions within that year in violation of Title 18 United States Code § 1001 and 2.

At the June 15, 1992 charge conference, counsel for several defendants objected to the Court's proposed jury instructions for the false statements offenses charged in Counts 14 and 29 of the superseding indictment. After the charge conference,

trial counsel for a co-defendant, David Jones, filed a Joint Supplemental Instruction to Assure Unanimous Verdicts as to the False Statement Counts which included Counts 14 through 29. An additional Joint Supplemental Instruction to Assure Unanimous Verdicts as to the False Statement Counts was filed in response to a written question from the jury.

In lieu of the instruction tendered by the defendant, the trial court provided the jury with the following general unanimity instruction: "In order to return a verdict, it is necessary that each juror agree thereto. In other words, your verdict must be unanimous."

Petitioner contended that he was entitled to further instructions directing the jury that it must unanimously agree as to the specific act or acts, method, mode or manner by which he violated the statute as charged in Counts 14 through 29. The court's general unanimity charge was deficient in that it failed to require the jury to unanimously determine the manner in which petition violated the statute.

The general unanimity instruction given by the trial court would allow some jurors to determine that one company was the related party while other jurors could determine that another company was the related party and would allow the jurors to make differing determinations regarding the manner and means of the commission of the offense.

When the government seeks to convict for one offense by proving two or more acts, proof of either one being sufficient, the court must instruct the jurors

that they must be unanimous in their finding that the government has proven the same one (or more) acts. United States v. Mangieri, 694 F.2d 1270 (D.C. Cir. 1982). Unanimity in jury verdicts is required by the Sixth Amendment to the United States Constitution. In criminal cases, this requirement of unanimity extends to all issues, such as the character or degree of the crime, guilt and punishment, which are left to the jury. Andres v. United States, 333 U.S. 740, 68 S.Ct. 880, 92 L.Ed.2d 1055 (1948).

Unanimity, of course, means more than a conclusory agreement that the defendant has violated the statute in question. There is a requirement of substantial agreement as to the principal factual elements underlying a specified offense. United States v. Gipson, 553 F.2d 453 (5th Cir. 1977). Courts have approved instructions which advised jurors that unanimity is required as to one specific part of a multi-part indictment count when discreet acts are alleged in a single count, any on of which is sufficient to convict. United States v. Jessee, 605 F.2d 430 (9th Cir. 1979); Bisno v. United States, 299 F.2d 711 (9th Cir. 1961), cert. denied, 370 U.S. 952 (1962), reh'g denied 371 U.S. 855 (1962).

In the instant case, the decision of the court below glosses over the serious problem caused by the lack of a unanimity instruction. This Court has recently reviewed the unanimity issue in Schad v. Arizona, __ U.S. __, 111 S.Ct. 2491, 115 L.Ed.2d 555 (1991). Schad resulted in a plurality decision, demonstrating a lack of consensus by this Court and providing a lack of guidance to the court's below. Moreover, Schad was a consideration of a state court

ruling and, thus, is distinguishable from federal cases, as was the case at bar.

The opinion of the Court in Schad rejected the "distinct conceptual grouping" analysis of Gipson; but recognized that there is a due process issue involved that restricts state legislatures from combining too diverse acts into one statute and not requiring the jury to unanimously find related acts. 111 S.Ct. at 2497, 2498. The opinion of the Court also recognized the desirability, if not the constitutional necessity, of instructions requiring verdict specificity. 111 S.Ct. at 2504.

The four Justices in dissent, led by Justice White, found that the key to whether specific verdicts were required was controlled by In Re Winship, 397 U.S. 358 (1970), and that a general verdict did not meet the requirements of due process set forth therein.

In post-Schad decisions the lower courts have continued to struggle with this difficult concept. In Jeffries v. Blogett, 988 F.2d 923 (9th Cir. 1992), the court, noting that when the proof is complex juror confusion is a real concern, found that although the general rule requires only a general unanimity instruction, an exception requires a specific unanimity instruction when the evidence is complex, as was certainly true in the instant matter. 988 F.2d at 937.

Moreover, in United States v. Holley, 942 F.2d 916, 925, 929 (5th Cir. 1991), the court noted that unanimity means more than a conclusory agreement that the defendant violated the statute and

distinguished Schad by noting that in Holley the issue was whether certain statements were false. The court opined that jurors finding varying statement's false would not comport with the requirement for a unanimous verdict.

The continued confusion in the lower courts on the unanimity instruction requires this Court to grant certiorari and provide further guidance to the lower courts. This case provides a proper vehicle to continue the discussion begun in Schad, as this is a federal proscution and, therefore, allows consideration of the issue when no state-federal concerns are present, including the role of the Sixth Amendment Right to a jury when considering this matter as an exclusively federal matter.

III. COUNTS FOUR AND FIVE ARE MULTIPLICITOUS THUS REQUIRING, UNDER PRINCIPLES RELATED TO DOUBLE JEOPARDY, THAT PETITIONER'S CONVICTIONS ON THOSE COUNTS, AS WELL AS THOSE ON COUNTS SIX THROUGH THIRTEEN AND THIRTY-SIX WHICH ARE DEPENDANT ON THE CONVICTIONS ON COUNTS FOUR AND FIVE, MUST BE SET ASIDE AND THE COUNTS DISMISSED.

The court of appeals has misapplied the appropriate analysis of whether or not two charges in an indictment are multiplications. The court of appeals concluded there were two schemes, justifying two counts, because some of the allegedly embezzled funds were used to purchase real estate and some were used to pay personal expenses. However, this

ignores the proper analysis of first examining the necessary "unit of prosecution." United States v. Sung, 934 F.2d 105, 108 (7th Cir. 1991).

Multiplicity occurs in an indictment when one crime or one act is divided into more than one count. See, United States v. Sue, 586 F.2d 70, 71 (8th Cir. 1978). A multiplicitous indictment impermissibly enhances the jeopardy of the defendant in violation of the double jeopardy clause. United States v. Maldonado-Rivera, 922 F.2d 934, 969 (2d Cir. 1990). At this stage of the proceeding, this double jeopardy can only be rectified by reversing Tom Henry's conviction on Counts Four and Five and dismissing both counts.

As noted above, in analyzing the indictment for multiplicity, the court must first identify the "unit" of prosecution." United States v. Sung, 934 F.2d at 108. As explained in United States v. Urlacher, 784 F.Supp. 62, 63 (W.D. N.Y. 1992), to identify this "unit of prosecution" the court must first examine the statute charged. United States v. Urlacher, 784 F.Supp. 61, 63 (W.D. N.Y. 1992) (citing U.S. v. Sung, 934 F.2d at 108).

The statute involved here, 18 U.S.C. § 666, provides in pertinent part, states:

> (a) Whoever, if the circumstance described in subsection (b) of this section exists-
>
> (1) being an agent of an organization, or of a State, local or Indian tribal government, or any agency thereof.

(A) embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the right owner or intentionally misapplies property that-

(i) is valued at $5,000 or more, and

(ii) is owned by, or is under the care, custody or control or such organization, government or agency; or

. . . .

shall be fined under this title imprisoned not more than 10 years, or both.

(b) The circumstances referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan guarantee, insurance, or other form of Federal assistance.

(c) This section does not apply to bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business.

(d) As used in this section-

. . . .

> (4) the term "in any one-year period" means a continuous period that commences no earlier than twelve months before the commission of the offense or that ends no later than twelve months after the commission of the offense. Such period may include time both before and after the commission of the offense.

The Urlacher court found that "the unit of prosecution" is '$5,000 or more,' from whatever source, in any one year period. . . ." 784 F.2d at 64. In so finding, the court premised its decision on United States v. Webb, 691 F.Supp. 1164, 1168 (N.D. Ill. 1988), wherein the court held the government could aggregate funds under § 666 in order to reach the $5,000 threshold amount. Based upon the conclusion in Webb, the court in Urlacher found that "[t]o permit the government to aggregate multiple conversions to reach the $5,000 minimum, and then to start over again in a separate and distinct count is illogical and certainly unfair." Urlacher, 784 F.Supp. at 64.

In the instant case, both Counts Four and Five charge Tom Henry with taking funds from Tennessee Health Services in 1989. Since funds are the relevant "unit of prosecution," under the plain language of the statute and the well reasoned analysis in Urlacher, these counts are patently multiplicitous. Therefore, the court below committed error by determining that the use of the funds embezzled constituted the relevant "unit of prosecution." Since, the analysis by the Sixth Circuit is out of sync with that of its sister

circuits, this Court should grant certiorari to guide and harmonize the decisions of the lower courts.

CONCLUSION

For the reasons set forth above, this Court should grant petitioner Tom Henry's petition for a writ of certiorari and review the decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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NO. _____

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM 1993

TOM HENRY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

APPENDIX

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NOT FOR PUBLICATION
No. 92-6649/6650/6653
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff/Appellee

vs.

TOM HENRY, DAVID JONES, JAMES HENRY,

Defendants/Appellants

ON APPEAL FROM UNITED STATES DISTRICT COURT FOR MIDDLE DISTRICT OF TENNESSEE

BEFORE: KEITH and KENNEDY, Circuit Judges; and JORDAN, District Judge.* **PER CURIAM:** Defendants-Appellants, Tom Henry, David Jones and James Henry appeal their convictions in connection with the theft of Medicare funds. James Henry was convicted of Making False Statements, in violation of 18 U.S.C. § 1001. Tom Henry and David Jones were convicted of Conspiring to Defraud the United States, in violation of 18 U.S.C. § 371, Obstructing a Federal

* The Honorable Leon Jordan, United States District Court for the Eastern District of Tennessee, sitting by designation.

Audit, in violation of 18 U.S.C. §§ 1516 and 2, and Making False Statements, in violation of 18 U.S.C. §§ 1001 and 2. In addition, Tom Henry was convicted of Theft Concerning Programs Receiving Federal Funds in violation of 18 U.S.C. § 666(a)(1)(A), Paying Kickbacks for Referral of Patients in violation of 42 U.S.C. § 1320(a)-7b(b)(2)(a), and Money Laundering in violation of 18 U.S.C. § 1957 and 2. For the reasons stated below, we **AFFIRM** the convictions and sentences imposed by the district court.

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I.

Tom Henry owned and operated Tennessee Health Services, Inc. (THS), which was the home office for numerous Home Health Care Agencies (HHCA) which he also owned, including First Tennessee In-Home Care (FTHHA); Mid-Cumberland Home Health (MCHHA); Doctors Home Health, Inc., (DHHA); South Central Home Health (SCHHA); and South West Home Health, Inc. (SCHHA). Tom's brother, James Henry was the administrator of SCHHA. Unlike the other HHCAs owned by Tom Henry, SCHHA maintained its own checking accounts, accounts receivable and payroll. Tom Henry controlled the accounts of the other HHCAs from THS.

The HHCAs were licensed by Medicare. Medicare is administered by the U.S. Department of Health and Human Services (HHS). HHS contracts with insurance companies (intermediaries) to distribute Medicare funds. The intermediary pays the Medicare funding to providers of medical care, such as HHCAs. Medicare covers the reasonable cost of direct patient

care and overhead expenses incurred.

The HHCAs receive Medicare funds through the intermediary at interim periods during the year based on claims for the preceding year. At the end of fiscal year, the HHCA submits a cost report to the intermediary summarizing expenses incurred that year for its Medicare patients. The intermediary reviews the cost report and if the actual costs on the report are more than the HHCA received during the year, Medicare pays the difference. If, however, the actual costs incurred by the HHCA for the year are less than the amount advanced by the intermediary, the HHCA must repay Medicare the difference.

The appellants in this case were involved in a number of transactions which enabled them to pilfer Medicare funds. One methods of unlawfully receiving Medicare funds was to direct the HHCAs to conduct business transactions with companies which the appellants secretly owned, and seek reimbursement for the profits made. An HHCA may do business with a related party, such as a company that is owned by or (Page 3) controlled by the owner of the HHCA. However, the HHCA may not receive Medicare money for profits made on the goods or services provided by that related party.

The appellants perpetrated this scam a number of times. For example, in 1989, David Jones and Tom Henry formed a management company called Datom International to manage the HHCAs. In addition, they formed Datom Business Service to perform accounting services for the HHCAs. In order to receive Medicare money for profits made from the management and accounting businesses, Tom Henry purported to sell THS and the HHCAs for $25,000 to

John Greer, Jr. In fact, the transaction was a sham; no money changed hands. Tom Henry and David Jones continued to control the agencies.

Also, in 1988, Tom Henry and David Jones "bought" Argus Medical Supply (Argus) from Sidney Ford, again for no money. Argus sold medical supplies to the HHCAs owned and operated by Tom Henry, with a markup of at least 65 percent. In addition, Tom Henry was one of the owners of First Tennessee Medical Supplies, Inc. Tom Henry directed employees of his HHCAs to purchase medical equipment from First Tennessee Medical Supplies, Inc. Tom Henry also formed KM & M Leasing Company (KM & M) with John Greer, Sr. KM & M leased vehicles and office furniture to the HHCAs owned by Tom Henry. Tom Henry split KM & M's profits with John Greer, Sr.

For each of the cost reports filed for the HHCAs, the appellants indicated that business was conducted with Argus, First Tennessee Medical Supplies, KM & M and profit was charged to Medicare as a cost. Nevertheless, the cost reports falsely stated that there had been no transactions conducted with related parties for the years in question.

In another scheme to illegally receive Medicare funds, Tom Henry paid a number of physicians a monthly fee to refer patients to his HHCAs. In 1988, Henry paid approximately $50,000 to these physicians under the guise of "medical advisors." Henry claimed that amount on the Medicare cost report for that year.

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In an additional effort to defraud Medicare funding, in 1989, David Jones and Tom Henry hired

Dan Miller, an accountant, to prepare a draft of the 1988 cost reports for the HHCAs. The agencies received money from Medicare during 1988 through interim payments. Miller found that in 1988, Medicare paid the HHCAs approximately $300,000 over the actual reimbursable costs incurred. In order to avoid reimbursing Medicare, David Jones told Miller to falsify the records so that it would appear nothing was owed to Medicare. Accordingly, Miller increased the salary amounts listed in the cost reports of some of the HHCAs for 1988, to make it appear that bonuses were paid to employees.

In 1989, the 1987 cost reports for a number of HHCAs were audited. To hide the fact that these bonuses were never paid, Tom Henry ordered Miller to give the auditors bogus checks and bank statements, including checks that had not cleared the bank and checks that were altered.

After learning that the 1988 cost reports would be audited, Tom Henry told Miller to prepare a list of employees and the amount supposedly paid to them in bonuses to match the amounts stated on the 1988 cost report. Tom Henry also told Miller to prepare notes of financial obligation purporting to reflect bonuses due to the employees, containing the employees' initials or signature. Many employees testified that the initials or signatures on the notes were not their own. In addition, David Jones told Miller to prepare Merit Pay Schedules purporting to show liquidation of the bonus amounts. The schedules were actually a listing of the employees' regular pay checks.

Miller also gave auditors documentation to support mileage expenses for Tom Henry for the THS

cost report. According to the documentation, Tom Henry made three round trips from Lebanon, Tennessee to Johnson City, Tennessee, and one round trip to Memphis, Tennessee, all in one day. Johnson City is approximately 250 miles from Lebanon, Tennessee. In addition, Miller claimed on the cost report amounts (Page 5) which were actually used for travel and expenses for Tom Henry and friends for a vacation in Cancun, Mexico.

In April 1990, the 1988 cost reports for FTHHS, SCHHA, DHA and MCHHA were audited. Under Tom Henry and David Jones' direction, Miller prepared false documentation showing that employees of MCHHA were paid $230,000 in bonuses, employees of DHA $90,500, and employees of SCHHA $12,500. None of these employees were paid this money at this time. In addition, Miller noted in the MCHHA cost report that Henry Puckett was paid $40,000 in salary, despite the fact he was not employed by MCHHA. In the DHA cost report, Miller state that $1,100 each was paid to Boston Baptist Church and to Greater New Salem Baptist Church. However, in fact, only $600 was paid in rent to Boston Baptist Church; the remainder was paid directly to Rev. Mays as compensation for referring parishioners to DHA. Rev. Walker of Greater New Salem Baptist Church was paid the entire $1,100 as compensation for referring parishioners to DHA.

Finally, Tom Henry directed the HHCAs to submit claims to Medicaid for co-insurance payments for Medicare patients. Medicaid will pay co-insurance only on Medicare patients for the purchase of medical equipment and supplies. Tom Henry altered the forms to claim $1,000,000, when only approximately $12,000 of the claims were legitimate.

At the appellants' sentencing hearing, the HHS testified to the amount of money appellants' owed according to the cost reports for the years in question, the amount of profit paid to related parties and charged to Medicare, the amount fraudulently recovered for personal expenses, and the amount incorrectly billed to Medicaid. James Henry was sentenced to 12 months incarceration, fined $3,000 and ordered to pay $42,010 in restitution. David Jones was sentenced to 51 months incarceration and restitution in the amount of $2,460,950.02. Tom Henry was sentenced to imprisonment (Page 6) for 57 months, restitution of $4,464,697.25 and forfeiture to the United States of $191,202.80.

II.

The appellants raise several issues on appeal. Each are addressed seriatim below.

A.

Tom Henry contends that the district account lacked subject matter jurisdiction over the charge that appellants' failed to disclose transactions with "related parties," in violation of 18 U.S.C. § § 1001 and 2. He argues that a determination of whether a provider has acquired goods or services from a related party is to first be reviewed by the administrative Provider Reimbursement Review Board (PRRB) of HHS.

Title 18 U.S.C. § 3231 vests federal district courts with jurisdiction over offenses against the laws of the United States. The defendants were charged with making false statements to the United States government. The district court therefor has jurisdiction to hear this case.

The Provider Reimbursement Review Board is an administrative resolution process for the resolution of civil claims. As the First Circuit noted in *United States v. Alemany Rivera*, 781 F.2d 229 (1st Cir. 1985), *cert. denied*, 475 U.S. 1086 (1985), the district court's assumption of criminal jurisdiction did not usurp the Provider Reimbursement Review Board's civil jurisdiction. *Id.* at 233. Because the HHS's primary jurisdiction for reimbursement disputes lies solely in the civil arena, the federal question jurisdiction of the district court in federal criminal cases is unaffected by the Medicare Act. Therefore, because defendants were charged with criminal offenses against the United States, the district court exercised proper jurisdiction over the prosecution of federal criminal statutes.
(Page 7)

B.

On appeal, David Jones contends for the first time that the government failed to prove he was the "David Jones" named in the indictment. Jones argues that the government failed to prove the identification element of its case. The identity of David Jones was not challenged during the trial, and no motion for acquittal on the failure to identify was made at the close of trial. Therefore, the defendant is precluded from raising this issue before this Court for the first time. *See Rebel Motor Freight, Inc. v. I.C.C.*, 971 F.2d 1288 (6th Cir. 1992). In addition, the silence of the witnesses who testified regarding David Jones' conduct (as well as the conduct of Tom and James Henry) is circumstantial evidence of identity, as these witnesses were well acquainted with David Jones, and if a different David Jones was being tried, such witnesses would no doubt have questioned his

presence in the courtroom. United States v. Fenster, 449 F.Supp. 435, 442 (E.D. Mich. 1978).

C.

Next, the appellants claim that the district court's jury instruction on the false statements counts failed to ensure jury unanimity. The appellants were charged with making false writings containing false statements. The trial court gave the following instruction on the requirement of a unanimous verdict:

> In order to return a verdict, it is necessary that each Juror agree thereto. In other words, your verdict must be unanimous.

During its deliberations, the jury asked the following:

> In Count Fourteen, where it reads 'he then and there well knew all costs listed on the cost [report] were not reimbursable' does 'all' mean the total amount or part of the $370,590?

At this point, the appellants filed proposed instructions on unanimity regarding related parties and reimbursable costs. The court denied the request, and the appellants challenge that denial on appeal.
(Page 8)

In this case, the jury unanimously found beyond a reasonable doubt that the defendants committed acts that caused false writings to be submitted to an agency of the United States. It does not matter whether the defendants "made" the false documents knowing that they would be passed on to the government or if they actually "used" the documents by physically passing them on to the government.

In reviewing jury instructions, this Court must examine the entire charge "to determine whether [the instructions] adequately inform the jury of the relevant considerations and provide a basis in law for aiding the jury in reaching its decision." *United States v. Montgomery*, 980 F.2d 388, 392 (6th Cir. 1992). Challenges to the trial judge's language are reversible only for an abuse of discretion. *United States v. Busacca*, 863 F.2d 433, 435 (6th Cir. 1988), *cert. denied*, 490 U.S. 1005 (1989).

In *United States v. Sanderson*, this Court held that the test for specific unanimity instructions is "a common-sense determination of a subject statute's application and purpose in light of traditional notions of due process and fundamental fairness." 966 F.2d 184, 188 (6th Cir. 1992). Applying the *Sanderson* test to the present issue, the intent of § 1001 is clear. The purpose of § 1001 is to punish those who cause false statements to be submitted to a government agency. "Make" or "use" are alternative means of satisfying this purpose.

Therefore, because the jury charge on this matter fully comported with traditional notions of fundamental fairness and due process, we find no error in the district court's instruction.

D.

David Jones challenges the sufficiency of the evidence to convict him of obstructing a federal audit, in violation of 18 U.S.C. §§ 1516 and 2. Jones argues that the government failed to prove that the HHCAs received in excess of $100,000 a year from the United States.

In order to determine whether the evidence was sufficient to support Jones' conviction, this Court must sustain the determination of the jury if it is supported by substantial and competent evidence. *United States v. Tilton*, 714 F.2d 642, 645 (6th Cir. 1983). This Court must determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, viewing the evidence in a light most favorable to the government. *United States v. Sanchez*, 928 F.2d 1450, 1457 (6th Cir. 1991).

At trial, the evidence established by the audits and other records revealed that the nursing homes involved received at least $100,000 a year. The evidence also established that Jones ordered the preparation of the cost reports that were sent to Medicare and attempted to cover up false cost entries by ordering an employee to prepare a schedule of bonuses called Merit Pay Schedules to show that the bonuses had been liquidated within a year of issuance. In addition, Jones gave altered checks to the auditors. In this case, it is clear that a reasonable jury could have found David Jones guilty of obstructing a federal audit.

E.

Appellants Tom Henry and David Jones argue that the district court erred by not allowing expert witness Gary Bowers to critique or comment on the testimony of other witnesses or to give legal opinions. The trial judge has broad discretion regarding the admission of expert evidence and evidentiary rulings should not be disturbed unless they are manifestly erroneous. *Mannino v. Intern. Mfg. Co.*, 650 F.2d

846, 849 (6th Cir. 1981). In this case, the court did not abuse its discretion. Bowers was allowed to attend the trial and testify on a number of issues, and was properly precluded from critiquing or commenting on the testimony of other witnesses. More importantly, this issue was not preserved for appeal. Under Federal Rule of Evidence 103, no error may be predicated on a ruling which excludes evidence unless the substance of the evidence (Page 10) was made known to the court by offer or was apparent from the context in which the questions were asked. Neither occurred in this case.

F.

Tom Henry contends that Counts Four and Five of the superseding indictment must be dismissed because they are multiplicitous. In Counts Four and Five, Tom Henry is charged with using two separate schemes to violate 18 U.S.C. § 666, Theft from a Program Receiving Federal Funds. Although the time during which the violations occurred was overlapping, in one scheme Tom Henry used funds embezzled from THS, an organization receiving federal funds, to purchase real estate, and in another scheme he used the funds to pay his personal expenses. The separate nature of these two acts properly constitute a basis to charge them both as separate offenses.

G.

Tom Henry next contends that the trial court lacked subject matter jurisdiction over Counts Four and Five. He claims that THS did not receive benefits from a federal program as contemplated by that statute. In fact, Medicare funds were disbursed through an intermediary to THS pursuant to a contract

with HHS to provide medical care to eligible persons. According to the legislative history of § 666, Congress intended to protect federal programs which result from a "a specific statutory scheme authorizing the Federal assistance in order to promote or achieve certain policy objectives." S.Rep. No. 225, 98th Cong., 2d Sess. 369, reprinted in 1984 U.S. Code Cong. & Admin. News 3182, 3510-11. Therefore, the district court properly exercised its jurisdiction because THS clearly received medicare funds.

Tom Henry also argues that the evidence was insufficient to convict him of Counts Four and Five, Theft from a Program Receiving Federal Funds. He contends that the related money laundering and forfeiture charges contained in Counts Six through Thirteen, and Thirty-Six, must therefore also fail for lack of sufficient evidence. Specifically, Tom Henry argues that the government was required and failed to prove (Page 11) that the money he took from the THS account and converted to his personal use were actually federal funds. He asserts he was entitled to the money he took from THS as compensation for the services he rendered to THS or as repayment of loans. However, as the court stated in *United States v. Westmoreland*, 841 F.2d 572, 577 (5th Cir.), *cert. denied*, 488 U.S. 820 (1988) the government is not required to trace the flow of federal money under 18 U.S.C. § 666. Therefore, Henry's argument fails.

Tom Henry also argues that he lacked criminal intent with respect to Counts Four and Five, because he held a good faith belief that he was entitled to the funds in question. The elements of knowledge and intent are questions of fact for the jury. *United States v. Johnson*, 767 F.2d 673 (10th Cir. 1985).

The government's evidence established that from 1987 to 1989, Tom Henry received $264,181.45 from THS in excess of sums legitimately due him. The evidence demonstrated that he used this money for personal expenses, such as credit car expenses, furriers and vacations. The jury properly concluded that he intended to misapply the THS money for personal expenses. Therefore, this Court upholds the convictions on Counts Four and Five, as well as the related charges in Counts Six through Thirteen and Thirty-Six.
(Page 12)

H.

Next, Tom Henry contends that the district court violated his right to due process by refusing to bifurcate the jury deliberations on the forfeiture count from the remainder of the case. The forfeiture count required proof by a preponderance of the evidence, while the remainder of the charges required proof beyond a reasonable doubt.

The decision to bifurcate jury deliberations of guilt and forfeiture is squarely in the discretion of the trial court judge. *United States v. Smith*, 966 F.2d 1045 (6th Cir. 1992). In this case, the trial court judge repeatedly emphasized to the jury, on both its jury instructions and on the verdict sheet, that the issues of guilt and forfeiture were to be determined separately. Therefore, there is no evidence that the court abused its discretion.

I.

James Henry contends that the district court erred in denying his motion for a bill of particulars. James Henry argues that he was surprised by

evidence of $29,010.00 in management and contract checks for Tom Henry which were included on the 1988 Medicare cost report for SCHAA.

The decision to grant or deny a motion for a bill of particulars lies within the sound discretion of the trial court. *United States v. Salisbury*, 983 F.2d 1369, 1375 (6th Cir. 1993). For the denial of a motion to be overturned, a defendant must show not only that the district court abused its discretion, but also that the defendant suffered surprise or other prejudice at trial. *Id.*, at 1375.

James Henry's contention of surprise is without merit. James Henry's counsel admitted that he learned of his client's participation in the cashing of the checks the week before the government discovered the information. Accordingly, James Henry (Page 14) has not shown either an abuse of discretion nor actual surprise. Therefore, the district court's denial of the motion was proper.

J.

In addition, James Henry argues that the district court erred in allowing testimony regarding his company-provided automobile, his joint ownership of the building in which SCHHA is located and the writing and cashing of the management and contract checks to Tom Henry. James Henry contends that the district court violated Fed.R.Evid. 401 and 403 in allowing this testimony.

The decision whether to admit evidence is under the discretion of the district court. *United States v. Brady*, 595 F.2d 359, 361 (6th Cir.), *cert. denied*, 444 U.S. 862 (1979). In reviewing the

decision, the evidence is viewed "in the light most favorable to its proponent." Fed.R.Evid. 401 states that evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable than it would be without the evidence." Fed.R.Evid. 403 limits the introduction of relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

There is no indication that the evidence, which was clearly relevant, was in any way unfairly prejudicial. Therefore, the district court properly admitted the evidence.

K.

Next, James Henry argues that the evidence presented was insufficient to convict him of Making False Statements in violation of 18 U.S.C. §§ 1001 and 2. As stated above, this Court must sustain the determination of the jury if it is supported by substantial and competent evidence. *United States v. Tilton*, 714 F.2d 642, 645 (6th Cir. 1983).
(Page 14)

The evidence in this case established that James Henry aided and abetted Tom Henry in knowingly and willfully making a material false statement on the 1988 SCHHA Medicare cost report. For example, although James Henry did not sign the cost report, he was extensively involved in the management of SCHHA. He maintained control of SCHHA's checkbook, accounts receivable and accounts payable. James Henry ordered that

improper checks be written to Tom Henry. This evidence, along with other incidents, provided a sufficient basis for the jury's determination of James Henry's guilt.

L.

David Jones argues that the district court incorrectly calculated the amount of money stolen from Medicare funds in determining his offense level at sentencing. Factual findings of the sentencing court are upheld unless clearly erroneous. *United States v. Muhammad*, 948 F.2d 1449, 1455 (6th Cir. 1991), *cert. denied*, 112 S.Ct. 1239 (1992).

Jones was found guilty of Making False Statements on Medicare cost reports in violation of 18 U.S.C. § 1001. In sentencing for § 1001 violations, the court calculates the sentence pursuant to U.S.S.G. § 2F1.1, which provides for a base offense level of six (6) and allows for increases based upon the amount of property stolen. In this case, the district court found that $3,669,331.39 was stolen, and increased David Jones' offense level by 13 points.

David Jones failed to present any evidence to establish that the government's calculation was inaccurate or "outside the universe of acceptable computations." *United States v. Tardiff*, 969 F.2d at 1288 (applying Section 2F1.1 to a conviction for mail fraud). The district court found that the government's calculations were correct, no evidence was presented to prove that this finding was clearly erroneous.
(Page 15)

M.

Next, James Henry contends that his offense level should not have been increased by two levels and that he should not have been required to pay restitution in the amount of $29,510.00. At sentencing, the district court added four points to James Henry's base offense level and ordered him to pay total restitution of $42,010.00.

In sentencing, the district court must consider relevant conduct in determining the appropriate guideline rang, according to section 1B1.3 of the Sentencing Guidelines. The district court's determination of relevant conduct will not be disturbed unless clearly erroneous. *United States v. West*, 948 F.2d 1042, 1045 (6th Cir. 1991), *cert. denied*, 112 S.Ct. 1209 (1992). This Circuit has repeatedly held that uncharged relevant conduct may be considered by the sentencing court in determining the guideline range. *Id.* at 1045; *see also United States v. Wilson*, 954 F.2d 374, 377 (6th Cir. 1992); *United States v. Kappes*, 936 F.2d 227, 229 (6th Cir. 1991). Conduct which is part of the same course of a common scheme may be included if there is some "indicium of reliability beyond mere allegation." *United States v. Smith*, 887 F.2d 104, 108 (6th Cir. 1989).

In determining defendant's offense level, the court included all amounts which were falsely claimed as reimbursable by Medicare on the SCHHA filing. James Henry was in charge of SCHHA, as shown by the fact that he maintained the checkbooks and signed the checks. His participation in the scheme to funnel $29,510.00 to his brother was clear, and properly included as relevant conduct by the district court.

James Henry also argues that since the $29,510.00 of "consulting fees" were not relevant conduct, that amount is not part of the underlying offense of conviction and, therefore, restitution may not properly be ordered. The government's evidence showed that the $29,510.00 consisted of SCHHA checks written to Tom Henry and cashed at the direction of James Henry. These fees were clearly a part of the "offense of conviction" and the district court correctly ordered James Henry to pay restitution for this amount.
(Page 16)

N.

James Henry also contends that the district court incorrectly enhanced his sentence two levels for "more than minimal planning," under U.S.S.G. § 2F1.1(b)(2). This finding will be reversed only if clearly erroneous. *United States v. Muhammad*, 948 F.2d at 1455. The evidence established that James Henry engaged in repeated acts to accomplish and conceal the making of false statements on a Medicare cost report. Based on this evidence, we find no error in the district court's determination that there was more than minimal planning on the part of James Henry.

O.

Next, James Henry argues that the district court erred in determining that he was not a minor or minimal participant in the scheme and, therefore, not entitled to a four level reduction under U.S.S.G. § 3B1.2(a). Again, the evidence showed that James Henry made false statements on at least two cost reports for SCHHA, signed fake promissory notes to support non-existent bonuses, and received cash from

checks written to Tom Henry for bogus consulting fees. Accordingly, we find no error in the district court's determination that James Henry was not a minor participant in this criminal activity.

P.

David Jones also contends that the trial court erred by enhancing his sentence three levels for a leadership role, rather than only by two levels for "more than minimal planning." Contrary to Jones' assertions, the trial court did not engage in double counting, because it did not apply enhancements for both having a leadership role and for engaging in more than minimal planning. Instead, the court simply applied the (Page 17) enhancement for a leadership role. Accordingly, we find no error in the district court's decision to increase Jones' guideline level for his role in the offense.

Q.

Finally, all three appellants argue that the district court erred in imposing restitution for losses for which the victim has or will receive compensation. They argue that, based upon audit adjustment facts, the correct amounts are much lower. However, according to the evidence, the amounts of restitution determined by the district court are proper, and the appellants have been credited with all amounts recovered.

III.

Therefore, we **AFFIRM** the appellants' convictions and sentences.

FILED
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Case No: 92-6650

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

UNITED STATES
OF AMERICA,

Plaintiff-Appellee

vs.

DAVID W. JONES,

Defendant-Appellant

BEFORE: KEITH and KENNEDY, Circuit Judges; JORDAN, District Judge.*

Upon consideration of the petition for rehearing filed by the appellant.

It is ORDERED that the petition for rehearing be, and it hereby is, DENIED.

ENTERED BY ORDER OF THE COURT:

LEONARD GREEN, CLERK

* The Honorable Leon Jordan, District Judge for the Eastern District of Tennessee, sitting by designation.

FILED
JAN 7 1994
LEONARD GREEN, CLERK

Case No. 92-6653

UNITED STATES COURT OF APPEALS
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ORDER

UNITED STATES
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